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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

LONNIE PAUL TRACEY,

Defendant and Appellant.

B289119

(Los Angeles County  
Super. Ct. No. PA071529)

APPEAL from an order of the Superior Court of Los Angeles County. Michael Terrell, Judge. Dismissed.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \* \* \*

Appointed counsel for defendant and appellant Lonnie Paul Tracey filed a brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) asking this court to review the record and determine if any colorable appellate issues exist. Defendant was advised of his right to file a supplemental brief and did not do so. Having concluded upon our review that defendant appealed from a nonappealable order, we dismiss the appeal.

### **BACKGROUND**

In April 2012, defendant was charged by information with one count of first degree murder (Pen. Code, § 187, subd. (a) [count 1]), and one count of assault with a firearm (§ 245, subd. (a)(2) [count 2]). It was also specially alleged as to count 1 that defendant personally and intentionally discharged and used a firearm causing great bodily injury and death to Anthony Davis, and, as to count 2, that defendant personally used a firearm in the assault on Mr. Davis's wife, Cindy Davis. (§ 12022.53, § 12022.5.) Defendant pled not guilty and denied the special allegations.

The case proceeded to a jury trial in October 2012. The jury found defendant guilty as charged and found true the special firearm allegations. The court sentenced defendant to a state prison term of 64 years to life, calculated as follows: 25 years to life on count 1, the base count, plus a consecutive 25-year term for the firearm enhancement pursuant to Penal Code section 12022.53, subdivision (d); and a consecutive four-year upper term on count 2, plus a 10-year term for the firearm enhancement pursuant to section 12022.5. Defendant was awarded 593 actual days of custody credits.

In addition to other fees not relevant here, the court imposed a \$5,000 restitution fine pursuant to Penal Code

section 1202.4, subdivision (b), and also ordered victim restitution payable to the Victim Compensation Board, pursuant to section 1202.4, subdivision (f), in the stipulated amount of \$39,585.49. The reporter's transcript from the May 10, 2013 sentencing hearing specifically provides that defense counsel conferred with defendant and then represented on the record that defendant stipulated to the restitution amount of \$39,585.49. Defendant timely appealed from his conviction. He did not raise any contentions challenging the propriety of the restitution fine or the victim restitution order. On September 2, 2014, in an unpublished opinion, we affirmed defendant's conviction. (*People v. Tracey* (Sept. 2, 2014, B249217) [nonpub.] )

On January 29, 2018, over three years after defendant began serving his sentence, he filed, in propria persona, two motions in the superior court titled "Motion for Modification of Sentence." One motion sought a modification of the \$5,000 restitution fine, and the other sought to modify the \$39,585.49 victim restitution order.

The trial court denied both motions by order dated February 22, 2018.

Defendant filed a notice of appeal on March 29, 2018, purporting to appeal from the court's order denying his motions.

### **DISCUSSION**

" '[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citation.]' [Citations.] There are few exceptions to the rule. [¶] [Penal Code] [s]ection 1170, subdivision (d), provides, in relevant part, that a trial court may recall the sentence on its own motion within 120 days after committing a defendant to prison. [Citation.] Section 1170, subdivision (d), does not authorize a

defendant to file a motion to recall the sentence. [Citation.] [¶] A trial court may correct a clerical error, but not a judicial error, at any time.” (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204-1205 (*Turrin*).) And, “an unauthorized sentence may be corrected at any time.” (*Id.* at p. 1205.)

None of the exceptions is applicable here. Defendant sought to modify both the restitution fine and the victim restitution order on the grounds, never previously raised before, there was no showing of his ability to pay at the time they were imposed. The restitution fine was set by the court within the range authorized by statute and the victim restitution order was set in an amount to which defendant stipulated. Defendant did not raise any challenge to these orders during the sentencing hearing or in his original direct appeal. There is nothing in the record demonstrating a clerical error in the rendition of these orders or that their imposition was unauthorized. Thus, the trial court was without jurisdiction to vacate or reduce either order.

Penal Code section 1237, subdivision (b) provides that an appeal may be taken “[f]rom any order made after judgment, affecting the substantial rights of the party.” Because the trial court was without jurisdiction to grant defendant the relief he sought, the order denying his motions did not affect his substantial rights within the meaning of section 1237. (See, e.g., *Turrin, supra*, 176 Cal.App.4th at p. 1208 [because trial court lacked jurisdiction to modify restitution fines, its “order denying [the] defendant’s motion requesting the same did not affect his substantial rights and [was] not an appealable postjudgment order”]; accord, *People v. Littlefield* (2018) 24 Cal.App.5th 1086, 1092 [trial court lacked jurisdiction to vacate the victim restitution order, therefore order denying motion did not affect

substantial rights and was nonappealable]; *People v. Mendez* (2012) 209 Cal.App.4th 32, 34 [order denying motion to reduce restitution fine to minimum provided by law filed more than three years after execution of sentence had begun was not appealable].)

Defendant's appeal must therefore be dismissed.

**DISPOSITION**

The appeal is dismissed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.